***

EXHIBIT 16

DOWNEYBRAND

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April 25, 2018

VIA FIRST CLASS MAIL AND EMAIL – WATERQUALITYPETITIONS@WATERBOARDS.CA.GOV

Mr. Phil Wyels
Office of Chief Counsel
STATE WATER RESOURCES CONTROL BOARD
P.O. Box 100
Sacramento, CA 95812-0100

Re: Petition for Review; Request for Abeyance
Client-Matter No. 43657.00000

Dear Mr. Wyels:

Enclosed please find the Petition for Review and Request for Abeyance related to the Central Valley Regional Water Quality Control Board Order No. R5-2018-0808. We request that a confirmation of our petition being filed and placed into abeyance be provided as soon as possible.

We appreciate your cooperation in this matter.

Respectfully submitted,

DOWNEY BRAND LLP

Melissa A. Thorme

cc: Russell Emerson, Valley Water Management Company

Enclosure

1516959.1

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Special Counsel for Petitioner
VALLEY WATER MANAGEMENT COMPANY

BEFORE THE

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of Valley Water Management Company for Review of Action and Failure to Act by the Central Valley Regional Water Quality Control Board, in Issuing Monitoring and Reporting Program No. R5-2018-0808.	**PETITION FOR REVIEW, PRELIMINARY POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW, AND *ABEYANCE REQUEST*.** **[WATER CODE §§13320; 23 C.C.R. §2050 *et seq.*]**

In accordance with section 13320 of the Water Code, Petitioner Valley Water Management Company ("Valley Water") hereby petitions the State Water Resources Control Board ("State Board") to review the action and failure to act by the Central Valley Regional Water Quality Control Board ("Regional Board") in issuing Order No. R5-2018-0808, a Monitoring and Reporting Program ("MRP") for Valley Water's McKittrick 1 and 1-3 Facility ("Facility") in the Belgian Anticline Oil Field in Kern County. In accordance with Title 23, California Code of Regulations ("C.C.R."), section 2050.5(d), a copy of Regional Board Order No. R5-2018-0808 for the Facility is attached as **Exhibit A.**

A summary of the bases for this Petition and a preliminary statement of points and authorities are set forth in this Petition for Review in accordance with Title 23, C.C.R. section 2050(a). Because it is not possible to prepare a thorough memorandum or a memorandum that is entirely useful to the reviewer in the absence of the complete administrative record, Valley Water reserves the right to file supplemental points and authorities in support of this Petition for Review

if and when the administrative record becomes available. Valley Water also reserves the right to submit additional arguments and evidence if needed to address any response by the Regional Board or other interested parties to this Petition for Review, in accordance with 23 C.C.R. section 2050.6, when and if this Petition is removed from abeyance.

1. NAME, ADDRESS, PHONE NUMBER, AND EMAIL OF THE PETITIONER:

Russell Emerson
Manager
Valley Water Management Company
7500 Meany Ave.
Bakersfield, CA 93308
(661) 410-7500
remerson@valleywatermanagement.org

All materials in connection with this Petition for Review and Abeyance Request should also be provided to the Petitioner's special counsel at the following address:

Melissa Thorme
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621 Capitol Mall, 18th Floor
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2. THE SPECIFIC ACTION OF THE REGIONAL BOARD WHICH THE STATE BOARD IS REQUESTED TO REVIEW:

Valley Water seeks review of the action of the Regional Board in connection with the issuance of the MRP because the Regional Board failed to comply with the Porter-Cologne Water Quality Control Act (Water Code §§13000 *et seq.*), Regional Board resolutions, and state regulations.

3. THE DATE ON WHICH THE REGIONAL BOARD ACTED OR FAILED TO ACT:

The Regional Board issued the MRP on April 4, 2018.

4. STATEMENT OF THE REASONS THE ACTION OR INACTION WAS INAPPROPRIATE OR IMPROPER.

On February 8, 2018, the Regional Board issued a draft MRP, which was intended to supplement and determine compliance with Valley Water's Waste Discharge Requirements ("WDR"), Order No. 69-199. Valley Water submitted comment letters, met with Regional Board

staff, and provided proposed redlines for the MRP. Many of the requested changes were made and Valley Water greatly appreciated working with staff to come up with a better version of the MRP that was ultimately issued on April 4, 2018. However, Valley Water remains concerned that the MRP protects uses of groundwater under the Facility, such as a municipal drinking water (MUN) use, that do not exist and should not have been deemed designated in 1989, or should be de-designated. Accordingly, Valley Water contends that the Regional Board's action, in connection with the issuance of the MRP, was inappropriate and improper for the following reasons.

A. Requiring Monitoring to Protect a Non-Existent MUN Use Is Unreasonable and Unnecessary.

The majority of MUN use designations of groundwater in the Central Valley were the result of the Sources of Drinking Water Policy. Therefore, the history of that policy must be taken into account in order to give this issue the appropriate context. The initial designation of groundwater in Kern County near and under the McKittrick facility was the result of the passage of Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986. (Health & Saf. Code, §25249.5 *et seq.*; Cal. Code Regs., tit. 27, §27001 *et seq.*) Among other things, Proposition 65 prohibits business activities from releasing certain chemicals that pass into a source of drinking water. (Health & Saf. Code, §25249.5.) Proposition 65 defined "source of drinking water" as "either a present source of drinking water or water which is identified or designated in a water quality control plan adopted by a regional board as being suitable for domestic or municipal uses." (Health & Saf. Code, §25249.11(d).)

Because many water quality control plans/Basin Plans throughout the state did not clearly identify waters with an MUN use, the State Water Resources Control Board ("SWRCB") passed Resolution No. 88-63 in 1988 in an effort to clarify Proposition 65's reference to "sources of drinking water" for purposes of enforcement of that statute. Resolution 88-63 provided that, with the *exception* of certain specified waters, all surface and ground waters of the state should be considered to be suitable, or potentially suitable, for municipal or domestic water supply.

Resolution 88-63, however, ran afoul of the California Administrative Procedure Act ("APA"). (Gov. Code, §§11346-11346.8.) In its Determination No. 8, the Office of Administrative

Law ("OAL") held that Resolution 88-63 was a "regulation" subject to the APA, and that its adoption violated Government Code §11347.5 (now §11340.5) because the SWRCB failed to comply with the APA. Thus, Resolution 88-63 was invalidated and should not have been used for regulatory purposes by any agency, including the Regional Board. (Gov. Code, §11340.5(a).)

Nevertheless, in 1989, the Central Valley Regional Board incorporated Resolution 88-63 into the Sacramento/San Joaquin River Basin Plan through Resolution No. 89-056 and, as relevant here, into the Tulare Lake Basin Plan through Resolution No. 89-098. The wording differs slightly between these two resolutions, but Resolution 89-098 stated the following:

> "[B]e it RESOLVED, that all surface and ground waters within the Tulare Lake Basin which currently have no beneficial use designation are hereby designated municipal and domestic supply (MUN), *with the exception of*:
>
> 1. Surface and ground waters where:
>
> a. The total dissolved solids (TDS) exceed 3,000 mg/L (5,000 µs/cm, electrical conductivity) and it is not reasonably be expected by the Regional Boards to supply a public water system; or
>
> b. There is contamination, either by natural processes or by human activity (unrelated to a specific pollution incident), that cannot reasonably be treated for domestic use using either Best Management Practices or best economically achievable treatment practices; or
>
> c. The water source does not provide sufficient water to supply a single well capable of producing an average, sustained yield of 200 gallons per day.
>
> 2. Surface waters where:
>
> a. The water is in systems designed or modified to collect or treat municipal or industrial wastewaters, process waters, mining wastewaters, or storm water runoff, provided that the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Board, or
>
> b. The water is in systems designed or modified for the primary purpose of conveying or holding agricultural drainage waters, provided that the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Board.
>
> 3. Ground waters:
>
> a. Where the aquifer is regulated as a geothermal energy

producing source or has been exempted administratively pursuant to 40 Code of Federal Regulation (CFR), Section 146.4, for the purpose of underground injection of fluids associated with the production of hydrocarbon or geothermal energy, provided that these fluids do not constitute a hazardous waste under 40 CFR, section 261.3;

and be it further RESOLVED, that the above criteria not withstanding, waters presently used for municipal and domestic supply are hereby designated for protection as MUN…." (Resolution 89-098, italic and bold added, underlining in original.)

In order to timely implement Resolution No. 88-63 at the least cost and effort, the Regional Water Board blanket designated MUN for all water bodies without any on-the-ground evaluation or assessment as to whether an MUN use actually existed, was a potential or probable future use, or was wholly unable to be utilized for MUN. In 2000, the SWRCB approved the Regional Board's Resolution 89-098 as a Basin Plan amendment notwithstanding OAL's disapproval of the basis for that resolution (i.e., SWRCB Res. 88-63), and the Tulare Lake Basin Plan thereafter has stated:

> Due to the "Sources of Drinking Water Policy," all ground waters are designated MUN (the **use may be existing or potential)** unless specifically exempted by the Regional Water Board and approved for exemption by the State Water Board.

(Tulare Lake Basin Plan, at pg. II-2 (emphasis added).)

Unlike other Basin Plans in California that identify whether uses are designated as existing or potential with an "E" or a "P," respectively, the Tulare Lake Basin Plan simply placed a dot in the MUN column, making the designation unclear. (*Id.* at Table II-2; see excerpt for Kern County Basin inserted below.) In other words, it is impossible to tell whether the use was designated as existing ("E") or merely potential ("P").

TABLE II-2
TULARE LAKE BASIN
GROUND WATER BENEFICIAL USES* (continued)

HYDROLOGIC UNIT	DAU	MUN	AGR	IND	PRO	REC-1	REC-2	WILD
Kern County Basin								
	245	•	•	•				
	254*	•	•	•	•	•	•	•
	255	•	•	•				•
	256	•	•	•	•			
	257	•	•	•		•		
	258	•	•	•	•			
	259*	•	•	•				
	260	•		•				
	261	•	•	•				

Although the Regional Board argues that these waters were designated in 1989, the presumption should be that the water was designated only as "potential" unless evidence in the record demonstrated that the designated MUN use was an actual, "existing" use.[1] A valid Regional Board decision must adequately consider all relevant factors and evidence, and demonstrate a rational connection between those factors/evidence, the choices made, and the purposes of the enabling statutes. (*See California Hotel & Motel Ass'n v. Industrial Welfare Comm.*, 25 Cal.3d 200, 212 (1979).) Without evidence of an existing use, such a designation would have been legally infirm.

Where no evidence supported an existing MUN use in 1989, which was the case for the water underneath the Facility's produced water percolation ponds at the time of designation, these waters should not have been deemed designated as an existing MUN use due to the exception language contained in Resolution No. 89-098, section 2.a. and/or 2.b, or should, at most, be deemed only *potentially suitable* for MUN. *See In the Matter of Own Motion Review of Failure to Modify Recreational Use Standards for Ballona Creek,* Order No WQO 2005-0004, 2005 WL 330488 at *10 (Jan. 20, 2005)("Defensible use designations are critical for many reasons. Designated uses and water quality criteria or objectives…form the foundation for regulation of waste discharges …. Further, accurate and defensible use designations are important to ensure that the Basin Plan is a useful and credible document.") (emphasis added)).

If any of the exceptions were met as of May of 1989 when Resolution No. 89-098 was adopted, then there should have been ***no designation of MUN*** due to the express language granting *exceptions* to the general rule of designation. (*See Blumenfeld v. San Francisco Bay Conservation etc. Com.* (1974) 43 Cal.App.3d 50, 59 (The interpretation of an administrative regulation is subject to the same principles as the interpretation of a statute); *Environmental Charter High School v.*

[1] The California Supreme Court has held that "source of drinking water" includes any water *currently* destined to be used as drinking water. Treating all water as an existing use, when it is only a potentially suitable source of drinking water "would greatly extend the reach of the statute, and would lead to absurd circumstances (like, for example, protecting brackish lagoons which never could be used for drinking water, but would still be designated 'potentially suitable.')" *See People of the State of California and the City of San Diego v. Kinder Morgan Energy Partners, L.P. et al,* U.S. Dt. Ct. for Southern District, Case No. 07-CV-1883 W (AJB), ORDER on Motion to Dismiss (2008) *citing People ex rel. Lungren v. Superior Court,* 926 P.2d 1042, 1049 (Cal. 1996). Thus, at most, if a designation did occur,

Centinela Valley Union High School Dist. (2004) 122 Cal.App.4th 139, 148–149, 18 Cal.Rptr.3d 417 (The plain meaning of the regulatory text must be employed);

Instead, the Regional Board is requiring dischargers to go through what may be an unnecessary exercise of de-designating waters that arguably were not or should not have been designated in the first place. This raises a question of fundamental unfairness when the burden of work and cost is placed upon permit holders to *undo* a use designation where the designation was never appropriate in the first place. As the City of Vacaville found out, the time and cost for the Regional Board to initially designate improper beneficial uses was minimal, while it took the City several years and several million dollars to de-designate uses where there was never any evidence that those uses existed or were probable future uses.

Unlike the Vacaville case, which involved surface waters with USEPA oversight and overlapping federal law provisions, the McKittrick permit only regulates discharges to land and groundwater, under state law. State law is clear that a regulation requires evidentiary support (*see Fullerton Joint Union High School Dist. v. State Bd. of Education (1982) 32 Cal.3d 779, 786; Associated Builders & Contractors, Inc. v. San Francisco Airports Com. (1999) 21 Cal.4th 352, 361).*

In addition, the precedential order issued by the SWRCB in the Vacaville case *required* the *Regional Board* to "promptly initiate" a basin plan amendment process when it determined that the designated uses were not appropriately designated. (*See* SWRCB Order 2002-0015 at 29 ("To address the inappropriate use designations, the Central Valley Regional Board must ***promptly initiate*** amendments to consider dedesignating COLD and MUN for Old Alamo Creek." (emphasis added).) While the State Board's directive was semi-conditional, based on "appropriate commitments" by the permit holder, this does not authorize the Regional Board to place the *entire* burden on the permit holder to complete all of the scientific studies needed, particularly when the uses were designated *without any evidence at all*. (*See Ballona Creek Order*, 2005 WL 330488 at *8 (Jan. 20, 2005) (use designation decisions must be based on evidence.") (emphasis added).)

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then only a ***potential*** MUN use was designated since the Policy's exceptions applied. The Regional Board's Basin Plans should be revised accordingly.

Thus, the initial MUN use designation under and around the Facility where the groundwater was and is not capable of being used for municipal supply was arbitrary, capricious, unsupported by substantial evidence, and, therefore, unlawful. Valley Water should only be required to demonstrate that the criteria to exempt the groundwater from an MUN designation existed at the time of the Regional Board's blanket use designation in 1989. If such exception criteria applied factually then, under the express terms of the 1989 Regional Board resolution adopting the Sources of Drinking Water Policy into the Basin Plan, the groundwater was *not designated* under the express terms and exemptions contained in the 1989 Regional Board Resolution No. 98-098.

No authority authorizes the implementation or enforcement of an unlawful regulation simply because the party against whom it is being enforced does not agree to contribute to the cost of amending the regulation. A permit holder should not have to expend monies to comply with factually incorrect and legally unsupportable Beneficial Use designations and the monitoring and reporting requirements that attach to the same, particularly when that data can subject the permit holder to substantial potential liability due to the inaccurate use designation. Valley Water has numerous times commented to the Regional Board that the exceptions to MUN designation should have been or should be used, or the de-designation process should be made more streamlined and should not require de-designation where the groundwater met the criteria of Res. 89-098 as of 1989.

At the hearing on the MRP in question, Valley Water formally requested that the groundwater under and near the Facility be deemed *not* to be MUN either through an exception under Resolution No. 89-098, or through a streamlined de-designation process. Valley Water hopes that this process can be completed before a new WDR permit is adopted for the Facility so that the new permit provisions, including the accompanying MRP, can be crafted to fit the actual uses to be protected under and near that Facility.

B. The MRP Did Not Comply with Legal Requirements.

The first sentence of the issued MRP states: "This Monitoring and Reporting Program (MRP) is required pursuant to Water Code section 13267." Water Code section 13267 allows the Regional Board to "investigate the quality of any waters of the state." *See* Water Code §13267(b). In conducting such an investigation, the Regional Board may require any person

discharging waste to furnish the Regional Board with technical or monitoring program reports required by the Regional Board. *Id.* The burden of these reports, including cost, must "*bear a reasonable relationship to the need for the report and the benefits to be obtained from the reports.*" *Id.* In requiring such reports, the Regional Board must provide a written explanation as to the necessity of the reports, and must identify the evidence that supports the requirement to provide the reports. *Id.; see also In the Matter of Napa Sanitation District, Bay Area Clean Water Agencies, and San Francisco BayKeeper*, State Board/OCC Files A-1318, A-1318(a), A-1318(b) (Dec. 5, 2001), at page 55 (requiring Regional Boards to include written findings and evidence in administrative orders issued pursuant to Water Code section 13267, setting forth the required analysis and rationale). Similarly, Water Code section 13225(c) allows the Regional Board to "[r]equire as necessary any state or local agency to investigate and report on any technical factors involved in water quality control or to obtain and submit analyses of water; provided that the burden, including costs, of such reports shall bear a reasonable relationship to the need for the report and the benefits to be obtained there from." *See* Water Code §13225(c).

In this case, the Regional Board failed to adequately analyze or explain the burden of the requested report, including cost, and to assess whether that burden bears a reasonable relationship to the need for the requested report and the benefits to be obtained from the report. *See* Water Code §13267. The Regional Board's failure to include such information violates the clear mandates of Water Code sections 13225(c) and 13267(b). Further, orders not supported by such supportive findings, or findings not supported by the evidence, constitute an abuse of discretion. *See Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 515 (1974); *California Edison v. SWRCB*, 116 Cal. App. 751, 761 (4th Dist. 1981); *see also In the Matter of the Petition of City and County of San Francisco, et al.*, State Board Order No. WQ-95-4 at 10 (Sept. 21, 1995). For the foregoing reasons, Valley Water challenges the validity of the MRP as contrary to the express terms of Water Code sections 13225(c) and 13267(b).

C. The Regional Board's Issuance of the MRP Was Unreasonable.

The California Legislature has found and declared that activities affecting water quality "shall be regulated to attain the highest water quality which is *reasonable*, considering all

demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." *See* Water Code §13000 (emphasis added). This section sets state policy and imposes an overriding requirement on regional boards that all orders and actions must be reasonable considering all circumstances. In this case, the totality of the requirements contained in the MRP are not reasonable, considering all of the related circumstances.

For example, the hundreds of thousands of additional dollars needed to continue to characterize waters that have been monitored for over a decade is unreasonable when those dollars could be better used to explore or pay for treatment solutions. The purpose of monitoring is to determine compliance with permit requirements and the permit does not require compliance with many of the monitored constituents, and the results may place Valley Water in compliance jeopardy under other environmental statutes due to imprecise use designations of the underlying groundwater. Expending substantial time and financial resources to conduct the new monitoring for essentially no scientific or analytical benefit is clearly unreasonable, unsupported, and unwarranted given the location and long term status of the discharge, and the lack of an actual existing MUN use of the underlying groundwater.[2]

In sum, the Regional Board failed to consider or enunciate in findings supported by evidence in the administrative record detailing the reasonableness, utility, cost, and benefit of the actions mandated by the MRP. For this reason, the Regional Board's action in issuing the MRP was clearly unreasonable. For the foregoing reasons, Valley Water challenges the MRP issued by the Regional Board.

5. THE MANNER IN WHICH THE PETITIONER IS AGGRIEVED:

[2] As stated in the McKittrick WDR Permit, Order No. 69-199, "usable ground waters in this area are confined to the Little Santa Maria Valley and other small alluviated valleys in the Belgian Anticline Oil Field south of McKittrick and to the area generally east of the Buena Vista some seven miles northeast of the disposal sumps." The WDR Permit also stated that "waste waters from these fields are roughly comparable to sea water in quality and not suitable for most beneficial uses'" *Id.* As discussed above, although local groundwater may have been designated as MUN, based on this information available in 1969, such designation was likely erroneous if the exceptions contained in the Basin Plan amendment, Res. No. 89-98, were met as of 1989.

Valley Water is aggrieved because the challenged requirements contained in the MRP are unnecessary and inconsistent with law. Valley Water is further aggrieved because many of the requirements were unreasonable or imposed without adequate justification and legal authority and without any demonstrated water quality or other public benefit. Water Code §13000, §13267.

Furthermore, the Regional Board's issuance of the MRP may expose Valley to unnecessary substantial expenditures for monitoring and reporting in the hundreds of thousands of dollars, and to potential civil and/or criminal penalties pursuant to environmental laws based on the data collected to protect erroneously designated groundwater uses.

5. SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD WHICH PETITIONER REQUESTS:

Valley Water seeks review of the MRP provisions, but intends to place this petition in abeyance under 23 C.C.R. §2050.5(d) to defer that review at this time. *See* Section 10 below.

7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION:

A preliminary statement of points and authorities are set forth in Section 4 above. In sum, the MRP provisions are inconsistent with the law and otherwise inappropriate because, *inter alia*, the Regional Board failed to comply with the Porter-Cologne Water Quality Control Act (Water Code §§13000 *et seq.*) and its implementing regulations; acted inconsistently with Water Board Resolutions and the Tulare Lake Basin Plan; failed to include findings required under Water Code sections 13267(b) and 13225(c), and failed to consider whether the substantial costs and liability associated with the MRP were reasonable, as required by the Water Code.

8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE REGIONAL BOARD AND THE DISCHARGER:

A true and correct copy of this Petition was hand delivered on April 25, 2018 to the Regional Board at the following address:

Mr. Patrick Pulupa and Ms. Pamela Creedon
Executive Office
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670-6114

The Petitioner in this case is the Discharger; therefore, a Petition was not separately sent to the Discharger.

9. A STATEMENT THAT THE SUBSTANTIVE ISSUES OR OBJECTIONS RAISED IN THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD, OR WERE UNABLE TO BE RAISED:

The substantive and legal issues raised in this Petition were presented to the Regional Board in written or oral comments. Although many of the MRP terms were negotiated, Valley Water informed the Regional Board that it planned to file this petition and request that it be placed in abeyance in order to protect its rights.

10. PETITIONER'S REQUEST FOR ABEYANCE

Valley Water respectfully requests that this Petition be placed in abeyance for two (2) years to allow Valley Water to work with the Regional Board on the issues raised herein.

Respectfully Submitted,

DATED: April 25, 2018

DOWNEY BRAND LLP

By: /s/ Melissa Thorme

MELISSA A. THORME
Attorneys for Petitioner
VALLEY WATER MANAGEMENT COMPANY

DOWNEY BRAND LLP